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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, Individually and as Collector of Internal Revenue for the District of Florida,

Petitioner,

vs

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, a Corporation,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The respondent, in opposition to the granting of the Writ prayed for by Petitioner, begs leave to present to the attention of this court the following facts as reasons why the writ should not be allowed.

STATEMENT

Respondent disagrees with the statement of facts as set out on page two of petitioner's brief. That statement would tend to cause this court to believe that the case involved only an amount of $5,000.00, while the record shows (p.9,10) that the case really involves a tax of 10 cents per

pound upon all of the product "manufactured and sold from the time business was commenced" as well as involving a tax upon all of respondent's wholesale and retail dealers, and that, as the tax claimed was 10 cents per pound, and the profit 3 cents per pound, it would be absolutely impossible to pay it and sue to recover it back.

The statement of facts as reviewed in the opinion of the Circuit Court of Appeals (R. 80-88) is very clear and concise and the facts briefly are:

The product upon which the petitioner attempted to levy, known as Southern Nut Product, was a mixture of coconut oil, peanut oil, salt, water and coloring matter. It contained no ingredients deleterious to health, was packed only in one pound cartons plainly labelled and showing its ingredients. It was the same as a product which was manufactured by a firm of Providence, Rhode Island, the Higgins Mfg. Co., known as Nut-Z-All, which prior to respondent's entering into the manufacture of the product had been held by Judge Brown in the District Court of Rhode Island (Higgins v. Page, 297 F. 644) not to be oleomargarine or taxable as such. No appeal was taken from that decision. The Commissioner of Internal Revenue had published this decision in the form of a Treasury Decision informing all concerned that that product had been held not to be taxable. The Commissioner had informed an association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, that the court had held the product not taxable and that the manufacturers or dealers were not subject to tax as on oleomargarine. The Commissioner again attempted to tax these products by Treasury Decision No. 4006. Judge Lowell, of the District Court of Rhode Island, (R-4-6), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia, had granted injunctions against the enforcement of the said Treasury Decision on the ground that the facts at that time constituted exceptional and extraordinary circumstances making Sec. 3224 R. S. inapplicable (R-5,6). No appeals

were taken from these decisions. Respondent then inquired of the Commissioner as to the taxability of Southern Nut Product which it contemplated manufacturing and selling, and was informed it had the same right to manufacture it without taxpaying it as oleomargarine as was being enjoyed by those firms which had obtained favorable court decisions. (R7). Petitioner began manufacturing the product which brought a profit of 3 cents per pound and so continued for two years. The respondent's product was before Judge Barrett of the United States District Court of the Southern District of Georgia (Baltimore Butterine Co. vs. Talmadge, 32 Fed. (2) 904) (R8) who decided it was not an imitation of butter, which decision was affirmed by the Circuit Court of Appeals of the 5th Circuit. (37 Fed (2) 1014). All these facts were set out in the bill, and proved on the hearing of the case. The trial court held that the material allegations of the bill had been established, and the Circuit Court of Appeals held that this conclusion was consistent with the Record. (Op. of Court R83,49 Fed (2) p. 82) After these cited court decisions, a bill was introduced in Congress to include such products as Southern Nut Product within the definition of oleomargarine. This bill became law, but was not effective until July 10, 1931. While such bill was being considered, the Committee on Agriculture of the House of Representatives reported that the purpose of the contemplated law was to tax a new class of products, such as Southern Nut Product, stating such products were not within the definition of oleomargarine under the *then* existing law. Congress believed the products were not taxable. The Commissioner of Internal Revenue did not believe such products taxable, and so wrote Congress recommending the passage of the bill. (R84)

In the face of all of the above facts, petitioner attempted to proceed and tax Southern Nut Product. All this is set out in the opinion below, (49 F. (2) 83). (R-80-87).

ARGUMENT

Petitioner relies upon but two specifications of error.

1. Sec. 3224 R. S. prohibits the injunction.
2. The Court erred in holding Southern Nut Product not oleomargarine.

A. *Specification Number One*

This court is limited to the question of law as to whether the facts as found by the District Court and elaborated upon by the Circuit Court of Appeals show such exceptional and extraordinary circumstances as to create an exception to Sec. 3224. Aside from this, the facts are not in issue.

The bill made certain allegations of fact as a basis of the plaintiff's right to an injunction. The answer and amended answer admitted some of these and denied others. The plaintiff offered in evidence testimony, documentary evidence, and physical exhibits; and as a result, the trial judge who heard this testimony, saw the records and the physical exhibits, found that the plaintiff had established the material allegations of the bill. The defendant placed no witness on the stand, nor offered any evidence of any kind.

The appellate court, in its opinion, fully reviewed these facts as shown by the record below, as found by the court below and by other courts dealing with the same subject matter. These facts are before this court now only for the purpose of determining the question of law as to whether, because of the conditions which they show, the court was correct in holding that they constituted such extraordinary and exceptional circumstances as to justify the injunction granted.

The first specification, that is, that the court erred in granting the injunction because of R. S. 3224, depends entirely upon whether the facts as set out in the allegations

of the bill, and proven by respondent at trial, create an exception to Sec. 3224 R. S.

In view of these facts, then, which have been conclusively proven (the question of proof not being before this court), the only question left for decision is whether those facts constituted exceptional and extraordinary circumstances as held by this court to constitute an exception to R. S. 3224. The words of the opinion below, (R80-88) so clearly and fully set out the contention of respondent that no attempt will be made to further elaborate upon or explain them.

Other questions before the lower court have not been specified in the petition, and not being before this court will be given no attention. (U. S. Supreme Court Rule. 27, Par. 2e). No citation of precedents other than those set out in the opinion of the Circuit Court of Appeals (R87) need be given. As stated, this court has explicitly recognized that Sec. 3224 R. S. does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable.

This leaves only for the consideration of this court the question of whether the facts as presented do constitute such circumstances. In addition to circumstances which have been held in the cited cases to be in the required category, we here have an absolutely arbitrary attitude by revenue officials who have without hearing declared a product taxable and who have, as stated by Mr. Justice Lowell, (R.6) asumed an attitude "entirely above and beyond the law", or, as said by Mr. Justice Railey (R.6), "there would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid."

This court in the decisions cited in the opinion below (Hill vs. Wallace, 259 U. S. 44) has clearly stated what it considers unusual and exceptional circumstances justifying an exception to Sec. 3224 R. S.

They were—

1. Heavy criminal penalties.

2. Impracticability of the method of paying the tax and suing to recover it back.

3. Destruction of business.

All of these circumstances are present here. Without the protection sought respondent and its dealers are subject to the most severe criminal penalties. Where the profit is less than one third the tax the prepayment and compliance with Sec. 3226 R. S. for recovery is impossible. The destruction of the business was certain. In addition to these circumstances we have the additional ones that the petitioner's acts are contrary to and in defiance of unappealed court decisions. Such acts are contrary to petitioner's own consent upon which respondent relied. Petitioner did not believe the law included respondent's product. Congress did not believe the law included substances such as respondent's product, and amended the law to include such products.

Petitioner, as a reason for granting the writ (P.4), refers to the case of Harrow Taylor Butter Co. vs Crooks. The facts in that case were so different from the facts here in issue as to form no comparative. The District Judge there decided the taxability upon the intention of the user, rather than upon the intention of the seller, as required by the wording of the law.

The Peacock and Jennings cases cited in the brief (P4) are not parallel. There the taxing authorities sincerely believed the levy to be a tax under the Revenue Act then in force and proceeded upon that theory. Here, as shown in the opinion of the Court of Appeals, the Commissioner of Internal Revenue did not believe the law then in force included products similar to respondent's product, and so informed Congress, and recommended legislation to include this new class of products; yet, at the same time arbitrarily

proceeded to collect under the law which did not include them, and in defiance of court decisions holding these products, not taxable.

In McCaughn vs. Hershey Chocolate Co. (May 18, 1931) this court said:

> "The reenactment of a statute by Congress, as well as the failure to amend it, in the fact of administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed."

This principle has been so often stated by this court as to almost become an axiom. The converse must be equally true, and where a statute is amended for the specific purpose of taxing a product on the express statement of the sponsors of the amendment that the law prior to amendment did not include it, and where the department charged with the enforcement recommends such amendment, it is highly persuasive, in view of the principle that all doubts must be decided in favor of the tax payer, that the product never was taxable under the old law.

We, therefore, submit that the circumstances were so unusual and exceptional as to constitute an exception to R. S. 3224.

B. *Specification Number Two*

On page two, petitioner recites his denial that Southern Nut Product is not oleomargarine. No word of proof was offered by petitioner to prove this allegation, while the evidence of respondent evidently satisfied the court, as other courts had been satisfied, that under the law as it then existed the product was not oleomargarine.

To be oleomargarine a product must come within the legal definition of that substance. It must first contain certain substances, mixtures or compounds, and unless it does contain those prescribed ingredients, it cannot be oleomargarine in any event; next, those substances, mixtures and

compounds do not make oleomargarine without the following test: they must be made in imitation or semblance of butter.

Petitioner seeks to have this court say that the lower court erred when it decided that Southern Nut Product was not oleomargarine, notwithstanding petitioner offered no word of testimony and no line of evidence to show that the ingredients were "made in imitation or semblance of butter, or when so made, calculated or intended to be sold as or for butter." The product is not before this court, but was before the trial court who had opportunity to give it all the tests required by the law, and to decide whether it was made in imitation or semblance of butter; and to compare it with the product of the Higgins Company, which had been held by Judge Brown (297 Fed. 644) not to be oleomargarine; and which the Government was making no attempt to tax, and whose non-taxability was made the basis of the assurance given to respondent that Southern Nut Product was not taxable. How can this court decide that Southern Nut Product was made in imitation or semblance of butter, and that the lower court in this case, the court in Higgins vs Page (297 Fed. 644) and the court in Baltimore Butterine Co. vs. Talmadge (32 Fed (2d) 904) where the product was physically present, were wrong?

FINDINGS OF FACT BY LOWER COURT WILL NOT BE DISTURBED ON APPEAL

Texas & Pac. Ry. vs. Ry. Com. 232 U. S. 338
58 L. ed. 630

Chicago, Junction R. Co. vs. King, 222 U. S. 222,
56 L. ed. 173

Dun vs. Lumbermen's Credit Assn. 209 U. S. 20
52 L. ed. 663

In *Texas & Pac. Ry. vs. Louisiana R. R. Com.*, 232 U. S. 338, the Circuit Court in an equity case for injunction gave judgment sustaining the exceptions to the master's report on the ground that the complainant had failed to prove

its case. On appeal to the Circuit Court of Appeals, the evidence was again reviewed and judgment affirmed. (192 F. 280). An appeal was taken to the Supreme Court. This Court said:

> "Both courts below passed on the facts and agreed in holding that appellant failed to establish by the evidence its right to the relief demanded and the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous."

In *Dun vs. Lumbermen's Credit Assn.* 209 U. S. 20 this court said:

> "We cannot, as we are asked to do by appellants, reverse the findings of fact made by the Circuit Court of Appeals. Successively considering the same evidence the two courts agree in the findings. In such a case in a suit in equity the findings will not be disturbed by this court, unless they are shown to be clearly erroneous."

Towson v. Moore, 173 U. S. 17
Brainard v. Buck, 184 U. S. 99
Shappirio v. Goldberg, 192 U. S. 232

The above case was cited and approved by the Supreme Court in *Charleston, S. C. M. & M. Co. vs. U. S.* 273 U. S. 220, decided in 1927, which was an equity case where the United States sought to enjoin its opponent from creating any cloud on property which the District Court and Circuit Court of Appeals had found had through fraud been procured from the Government. There, there was a conflict of evidence, but the facts as found by the District Court were sustained by the Circuit Court of Appeals. Justice Taft said:

> "The rule is well established that this court will not disturb a finding of fact made by a District Court in equity concurred in by the Circuit Court of Appeals",

citing:

U. S. vs. State Investment Co. 264 U. S. 206, 211, 68 L. ed. 639, 642;

Brewer-Elliott O. & G. Co. vs U. S. 260 U. S. 77, 86; 67 L.ed. 140, 145;

Bodkin v. Edwards, 255 U. S. 221, 233, 65 L. ed. 595, 601;

Nat'l Bank v. Shackleford, 239 U. S. 81, 82, 60 L. ed. 158

Wright-Blodgate Co. vs U. S. 236 U. S. 397, 402

There being nothing before this court, then, except the determination of whether the facts as found by the trial court, and affirmed by the appellate court, create circumstances justifying an exception to R. S. 3224, we present that the petition should be denied.

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